Joint Committee on Boards, Commissions and Consumer Protection

BACKGROUND PAPER FOR HEARING JANUARY 4, 2005

COURT REPORTERS BOARD

BACKGROUND, IDENTIFIED ISSUES, AND QUESTIONS

BRIEF OVERVIEW OF COURT REPORTING PROFESSION AND THE COURT REPORTERS BOARD

An accurate written record of who said what in court is essential if the outcome of judicial proceeding is to be accepted by the litigants and the public as non-arbitrary, fair, and credible.

In criminal cases, for example, courts of appeal rely exclusively upon a written briefs and a written transcript to adjudicate the lawfulness of what occurred at trial. A conviction – and thus in some instances the life or death of an accused – can stand or fall based entirely upon what a witness said, what a lawyer said, what a juror said, or what a judge said, as solely reflected in the written transcript.

In civil cases, millions of dollars, life-long careers, and the fate of whole businesses enterprises can hinge on what was said or what was not said in a deposition or at trial.

Moreover, the testimony in civil and criminal cases is often thick with technical jargon. A medical malpractice case where specialist experts from both sides contradict one another can involve complex technical medical terminology; criminal cases can involve scientific language related to DNA identification; anti-trust cases can involve diction from economic theory, and so on. No matter how obscure or technical, such jargon must to-the-word accurately be reflected in the written transcript.

Court reporters are highly trained professionals who transcribe the words spoken in a wide variety of official legal settings such as court hearings, trials, and other litigation-related proceedings such as depositions.

Established in 1951 by the Legislature to protect consumers from incompetent practitioners, the Certified Shorthand Reporters Board, now known as the Court Reporters Board of California (Board), regulates the court reporting profession through testing, licensing, and disciplining court reporters.

In California, court reporters use the title Certified Shorthand Reporter (CSR), which is a designation restricted by statute to those individuals who have a Board-issued license.

In California a person can be licensed to work as a court reporter employed by state courts (official reporter) or to act as a deposition officer (freelance reporter).

Freelance reporters can be hired as individual contractors or can be hired by court reporting firms which, in turn, are hired by law firms or lawyers to provide services in depositions.

The laws governing deposition/freelance reporters can be found in the Code of Civil Procedure Section 2025, et seq.

As of June 30, 2004, there are 7,835 CSRs in California.

The Board has oversight of court reporting schools in addition to having oversight over CSRs. Although the Board "recognizes" schools, there is no statutory authority for licensure. Even so, only court reporting schools "recognized" by the Board can certify students to qualify for the CSR examination. The Board can also issue citations, and fine schools not in compliance with Board rules.

There are 17 schools of court reporting recognized by the Board (10 public schools and 7 private schools). Since the last Sunset Review, two schools have closed and a new one has opened. The Board can discipline schools up to and including removing recognition.

Until the 1960s, the Board allowed only CSRs to own and operate companies offering court reporting services. However, when no statutory authority supporting that prohibition could be found, the practice ceased, and in 1972, the Board began registering reporting corporations.

That process was rescinded by Assembly Bill 2743 (Chapter 1289, Statutes of 1992) when the Board decided that the registration duplicated the filing required by the Secretary of State's Office, provided no additional benefit or consumer protection, and was an unnecessary expense for businesses.

Also in 1972, the Board's authority was expanded to give the Board the ability to recognize court reporting schools and to set minimum curriculum standards for court reporting programs. Additional authorization to cite and fine schools was passed by the legislature in 2002. (B&P Code Section 8027.5)

Applicants pay a fee of $40 to the Board; the statutory limit. The Board does not charge any fee for taking the exam, although it is permitted to charge up to $75 by statute. The annual license renewal fee is $100, although the statutory limit is $125.

The rates charged by freelance reporters and the businesses that employ them are not fixed by statute. That was not the case in the past but in a compromise package with the profession, the Legislature and the Governor, eliminated rate regulation in 1981 and created the Transcript Reimbursement Fund (TRF), a special fund paid for by a portion of the court reporters' licensing fees.

The purpose of the TRF is to reimburse CSRs for transcripts produced for indigent litigants in civil cases. To create the TRF, licensing fees were initially increased from $40 every two years to $125 the first year, and $60 the second year. Subsequently, the fees were increased to $80 and then to the current annual fee of $100. Under the program, the Board has paid more than $6 million from the fund.

By law, the TRF must begin each fiscal year (July 1) with a minimum balance of $300,000.

Prior to January 1, 1983, state courts had been allowed to use noncertified reporters if they could demonstrate that a certified reporter was not available. B&P Code Section 8016 now requires all state court reporters to be licensed as CSRs. Court reporters hired prior to 1983 can still maintain an exemption to the licensing requirement.

The Board is composed of five members, two of whom are licensed CSRs and three of whom are public members. Any licensee who has been practicing for a minimum of five years is eligible to be appointed to the Board, but public members are prohibited from having had any involvement in the profession within five years preceding their appointment. The Governor appoints the two-licensed members and one public member. These three appointments require Senate confirmation. Of the two remaining pubic members, one is appointed by the Speaker of the Assembly and the second is appointed by the Senate Rules Committee. All serve four-year terms. The Governor's appointees may serve up to a 60-day grace period at the end of their term; the other appointments can serve up to a one-year grace period at the end of their term. There is a maximum of two consecutive terms for appointments. There is one vacancy on the Board.

BOARD MEMBER	APPOINTED BY	APPOINTMENT YEAR	TERM EXPIRATION
Julie Peak	Governor	2001	June 1, 2005
Karen Gotelli	Senate Rules Committee	2003	June 1, 2007
Gary Cramer	Governor	2002	June 1, 2005
Dr. John Hisserich	Speaker of the Assembly	2003	June 1, 2007
Vacant	Governor		Vacant as of 6/1/04

PRIOR SUNSET REVIEW

The Board was last reviewed in 2000. Questions raised by the erratic and very low passage rates of those who paid for and successfully completed coursework at certified CSR schools, and the ever-increasing amount of time to complete the coursework, dominated the last review. The Board at that time indicated that, on average, it took about seven years to complete training that would allow a student to sit for the licensing exam. Likewise, data revealed that in 1997's two exams, the passage rate was between 14-15%, shooting up to 45% in May of 1998, back down to 18% for the exam taken in November of the same year. Prior to these years, while exam passage rates varied significantly, they mostly stayed in the 30-plus percent range.

This Committee made the following recommendations in the last review:

- The Committee recommended that the State continue to regulate the court reporting profession using the existing board structure.

- Citing a history of both inconsistent and very low passage rates for the CSR exam, the Committee recommended that the Board conduct an analysis of the exam passage rate, relative to the different licensing pathways, to determine which candidates are better prepared for the state examination. This was intended to discover whether court reporter schools are adequately preparing students to pass the licensing examination, or whether other requirements for licensure may have to be changed.

- Citing the Board's incorrect assumption that it had limited authority over schools, but noting that coordination with Bureau for Private Postsecondary and Vocational Education (which has approval authority over the school's operations) would be laudable, the Committee recommended supporting the then- current effort to coordinate the activities of both the Board and the Bureau by their entering into a Memorandum of Understanding (MOU).

- The Committee also recommended that the Board should implement recommendations it made to the Committee and Department of Consumer Affairs (DCA) for increasing the exam passage rate and improving court reporter education.

NEW ISSUES

ISSUE #1: The Governor's California Performance Review (CPR) suggests that regulation of the profession endure, but that the Board be eliminated and replaced by a bureau within the DCA. Should the profession be regulated and, if so, should it be regulated by a board or a bureau.

Issue #1 question for the Board and DCA: *Should the court reporting profession be regulated and, if so, by a board structure? How do the Board and*

DCA respond to the CPR suggestion? Would doing away with the Board improve the program by making it more directly accountable to the elected Governor, as CPR argues? How would the public have input into the Board's regulatory processes if the Board's public members were eliminated (along with the whole Board) and if decisions could be made without complying with open meeting laws that govern boards? Can DCA compare its experience with bureaus and boards and offer an opinion as to whether one or the other is better, and whether the advantage can be attributed to chain-of-command accountability to the elected Governor?

Background: Like virtually all the professions within the DCA, the court reporting profession is overseen by the multi-member Board. The Governor's CPR accurately summarizes why boards developed:

> "Boards and commissions first became popular in the late 19th Century. As a response to the corrupt 'big city bosses' that ruled American cities during the late 1800s and the early 1900s, reformers sought to remove power and influence over services from what they believed were the clutches of highly partisan and self-centered politicians. Instead, key government decisions would be made by boards and commissions comprised of 'experts' who would supposedly apply their expertise in a neutral fashion, influenced only by what worked and what was right, or so the theory went." (*California Performance Review*, Vol. II, "Form Follows Function")

The Review also argues that boards diffuse accountability away from elected officials and, hence, tend to be more insular and not as responsive to the public as they could be:

> "The controversy surrounding the criminal trials of the officers accused of beating Rodney King and the subsequent riots provides an excellent example of how boards and commissions can insulate elected officials and confuse accountability. During the riots, former Police Chief Daryl Gates was widely criticized for failing to send in a sufficient number of police soon enough to prevent bloodshed and looting. Yet, under Los Angeles' boards and commissions structure, neither the Mayor not the City Council—those most accountable to the electorate—could fire the Chief. That could only be done by the unelected appointees of the Los Angeles Police Commission." (*Ibid*.)

Emphasizing the virtue of accountability over avoiding allegedly "corrupting" politics, the Review asserts:

> "While boards and commissions have in some measure successfully insulated decision-makers from politics and given a semblance of transparency and public access, the problem now is a lack of general accountability. When something goes wrong with a board or commission,

> the electorate feels powerless because it is powerless; there is literally no one to hold directly accountable. And transparency without accountability is a façade."(*Ibid*.)
>
> And, the Review summarizes its opinion in this way:
>
> "The line between the Governor and the performance of executive branch functions should be as straight as possible.
>
> When state goals are pursued through un-elected boards and commissions, government is less accountable than if the tasks had been performed directly. If a program is failing Californians, good government demands that blame be easy to affix and hard to deflect. The current structure of boards and commissions creates the opposite situation." (*Ibid*.)

Foreshadowing one criticism, the Review correctly observes that:

> "[i]mportantly, eliminating a board or commission does not legally bar the government from soliciting the advice of relevant experts. Administrative agencies without statutory board or commission leadership do this all the time. They do it informally, through ad hoc consultations, or formally, through advisory boards or task forces appointed by the director of a program. When the head of an agency seeks such expertise, it will be because—as an accountable official—he or she thinks the advice is needed. It will not be because a statute passed thirty years ago forced the agency head to obtain the advice, needed or not." (*Ibid*.)

Applying these principles to the Board, the California Performance Review suggests that regulation of the profession endure, but the Board itself be eliminated. It reasons as follows:

> "Eliminate the Board because it is not necessary to the performance of the program's regulatory functions. The operations should be performed by the Commercial Licensing Division of the new Department of Commerce and Consumer Protection. Independent reviews of appeals should be performed by administrative law judges within the Office of Management and Budget. The resulting recommended decisions should be affirmed or rejected by the Secretary of the Department of Commerce and Consumer Protection." (*Ibid*.)

In other words, the Review suggests retaining regulation of the profession, but doing away with the board structure for doing so. The licensing functions of the Board would be performed by a new, consolidated Division with responsibility for a broad array of professional licensing. Administrative disciplinary decisions -- presumably, which cases to pursue and which administrative law judge decisions to approve or reject -- would be

made by the Secretary. The Secretary would presumably also craft and approve regulations.

ISSUE #2: The Board had accumulated a massive surplus in FY 02-3, but in its Report the Board projects steadily declining surpluses from FY 03-04 to FY 07-08.

Issue #2 question for the Board: *Given that the Board does not appear to forecast any significant increase in expenses or reduction in fees, why is the Board projecting a steadily declining surplus instead of a steadily increasing one? What has changed from what caused the Board to accumulate a 34 month reserve in FY 02-03? If the reserve is steadily declining, is a fee increase required? If, instead, the Report is in error and the surplus will once again steadily increase, is a fee reduction warranted?*

Background: The Board had a reserve surplus of 34 months during FY 03-04. The Board projects declining surpluses beginning in FY 04-05 all the way to FY 07-08. (*Report* at page 12)

In FY 2003/04, the General Fund borrowed $1.25 million from the Board. (*Report* at page ii)

The Board forecasts neither a reduction in fees nor a significant increase in expenditures. Even accounting for the $1.25 million loan, all things being equal, one would expect the same fee structure and the same operations to lead to the same surplus. Instead, the opposite is forecast.

It is unclear how a DCA board could lawfully amass a 34 month reserve. B &P Code sec. 128.5 requires that any board with a reserve equal to or greater than its operating budget for the next two fiscal years "shall reduce license or other fees. . . during the following fiscal year in an amount that will reduce any surplus funds of the agency to an amount less than the agency's operating budget for the next two fiscal years."

It is thus unknown why the Board's fee structure and operations would lead to a massive surplus in FY 03-04, but lead to declining surpluses thereafter.

ISSUE #3: There is a significant disparity between the license exam passage rate of publicly-run court reporting schools and privately-run ones.

Issue #3 question for the Board: *Why the considerable difference? What can the Board do to work with public schools to improve this situation?*

Background: As the Board documents in the following charts, there are significant differences between the passage rates of students who attend private versus public educational programs:

COURT REPORTERS BOARD OF CALIFORNIA

FT Passrate Overall - **Public Schools**

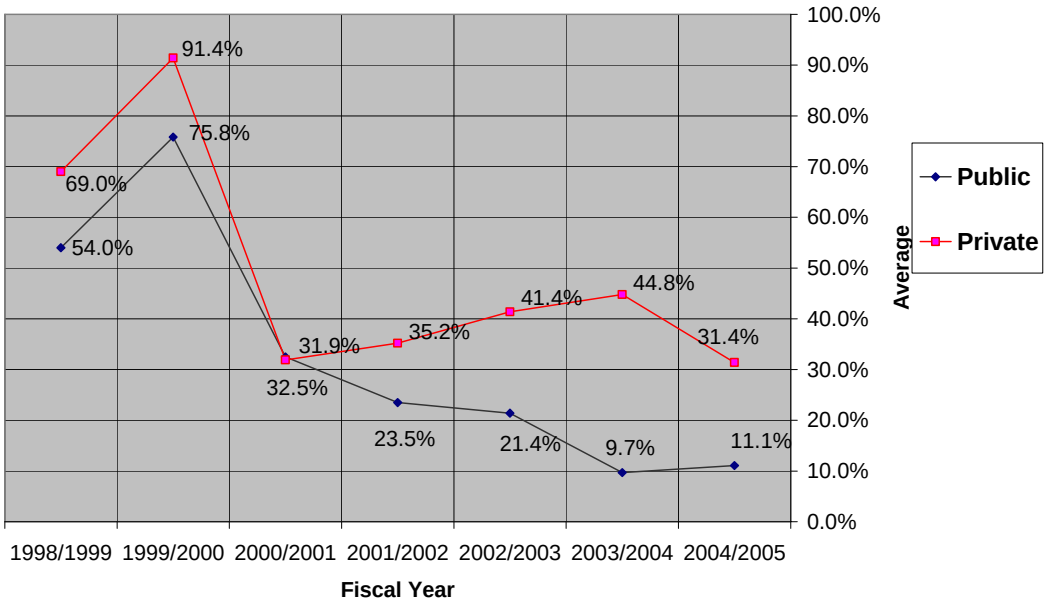
	FY 2004/2005[1)]	FY 2003/2004[2)]	FY 2002/2003[2)]	FY 2001/2002[2)]	FY** 2000/2001[1)]	FY 1999/2000[3)]	FY 1998/1999[3)]
Argonaut	66.7%	25.0%	16.7%	41.7%	40.0%	83.4%	86%
Bakersfield	none	0.0%	33.3%	0.0%	0.0%	50.0%	17%
Cerritos	none	0.0%	0.0%	0.0%	0.0%	80.0%	50%
College of Marin	0.0%	33.4%	75.0%	none	100.0%	100.0%	33%
College of the Redwoods	none	none	0.0%	100.0%	50.0%	none	none
Cypress	0.0%	0.0%	0.0%	0.0%	60.0%	100.0%	88%
Downey	0.0%	0.0%	0.0%	39.3%	0.0%	100.0%	100%
Oceanside ROP	none	0.0%	0.0%	0.0%	0.0%	66.7%	50%
Tri Community	0.0%	0.0%	50.0%	33.4%	75.0%	37.5%	50%
West Valley	0.0%	0.0%	50.0%	0.0%	0.0%	62.5%	25%
Average	11.1%	9.7%	21.4%	23.5%	32.5%	75.8%	54%

FT Pass Overall - **Private Schools**

	FY 2004/2005[1)]	FY 2003/2004[2)]	FY 2002/2003[2)]	FY 2001/2002[2)]	FY** 2000/2001[1)]	FY 1999/2000[3)]	FY 1998/1999[3)]
Bryan*	75.0%	66.7%	50.0%	50.0%	66.7%	100.0%	100%
Court Reporting Institute*	25.0%	19.4%	18.9%	25.0%	33.3%	83.4%	69%
Golden State*	0.0%	83.4%	n/a	n/a	n/a	n/a	n/a
Humphreys	none	none	none	50.0%	none	100.0%	75%
Sage / Ca Sch of Ct Rep*	28.6%	63.0%	43.5%	63.5%	25.0%	100.0%	64%
Sierra Valley*	0.0%	0.0%	61.1%	0.0%	28.6%	62.5%	33%
South Coast*	60.0%	19.4%	33.3%	22.9%	5.8%	85.9%	71%
Average	31.4%	44.8%	41.4%	35.2%	31.9%	91.4%	69%

1) One examination in period reported
2) Three examinations in period reported
3) Two examinations in period reported
*Licensed by Private Postsecondary & Vocational Education
**FT stats n/a November 2000

Note: School percentages are an average for all tests for the reporting period, and may not equate for participatoin in each exam for the period reported.



The disparity is roughly 20-25% currently, and has generally fluctuated in the 15% range in the past. An anomaly occurs in 2000/01, when the rates approached parity, but since that time, the gap has increased, and hit its high in 2003/04 of just under 35%.

ISSUE #4: Whether licensees should be required to take some kind of continuing education (CE), perhaps limited to written exams and changes in applicable law to keep costs low, but timely competence high.

Issue #4 question for the Board and DCA: *The Board states that prior administrations were not in support of starting new CE programs, or one for this Board. Why? Can the Board commit to a date certain by which some CE will be required and implemented?*

Background: In response to questions from the Committee, the Board stated that "The previous two administrations were not in support of starting new CE programs, so the issue was not reviewed." (*Board Response to Follow-up Questions*, p. 3) Was the Board informed of this lack of support in writing? And, if cost is a concern, why need there be any cost at all to licensees? Is the Board aware that the State Bar permits attorneys to meet a significant amount of their continuing education requirements through written self-study appearing in such magazines as *California Lawyer*?

ISSUE # 5: Although attorneys are the most likely source of complaints about licensees, the Board concedes that few attorneys know the Board exists.

Issue #5 question for the Board and DCA: *Is there a need for the Board to do greater outreach to the professional legal community to make sure those in the best position to have concerns about the Board's licensees will know about its existence and how to contact it?*

Background: The Board's enforcement program is only as effective as the number and quality of complaints it receives. The Board cannot resolve problems it does not know about, and consumers cannot register their concerns with a Board they do not know exists. Since, in a very real sense, lawyers are the consumers of a court reporter's product, it is essential that these consumers know they have a place to go to complain about potentially inferior and problem reporters**.**

Board members in conversation have acknowledged that more can be done to inform the legal community that the Board exists and how they can file a complaint against a licensee.

There are many cost effective -- indeed, nearly free -- ways to "get the word" out to attorneys. For example, the CE for practicing lawyers is an ideal potential way to inform the vast majority of all practicing lawyers about what the Board is and what it does in a targeted way. The Board could certainly enter discussions with the State Bar to see if

some simple method of distribution of Board materials might be available through attorney CE channels.

Other similar – and nearly cost-free – methods are available for the Board to consider, such as: seeking links and additions to frequently-visited legal websites (e.g., county bar association sites, the State Bar sites, or Findlaw); asking the State Bar to include a small informational flyer in Bar dues renewal notices; having Board Members attend, actively participate in, or make information available at, local and State Bar conferences; seeking to have such conferences include a seminar on the court reporting profession and the activities of the Board; and/or holding informational meetings at the State's largest law firms.

ISSUE #6: The Board has entered into an MOU with the troubled Bureau of Private Postsecondary and Vocational Education (BPPVE) to assure the quality of court reporting education.

Issue #6 question for the Board: *Given the well-publicized problems with the BPPVE, what steps has the Board taken to ensure that the BPPVE is effectively overseeing the quality of court reporting education?*

Background: The BPPVE and the Board have potentially overlapping jurisdiction where court reporting schools are concerned. In July of 2002 the Board entered into a Memorandum Of Understanding (MOU) with the BPPVE. The purpose of the MOU was to prevent duplication of efforts and clearly to divide responsibilities for oversight of court reporter schools between the two agencies.

To this end, the MOU provides that the BPPVE will assume "sole responsibility for the adoption of minimum standards for refund policies, enrollment agreements, contracts[,] consumer information, attendance policies, and financial responsibility pursuant to Section 94774 of the Education Code."

Likewise, the Board promises to "assume sole responsibility for the definition, review, and upgrade of the schools' curriculum, instructor qualifications, and quality of administrative staff pursuant to Business and Professions Code Section 8027, and Title 2 Section 2411 of the California Code of Regulations (CCR) and other CCRs as required by statute changes."

In sum, then, a significant part of court reporter school oversight is, by statute and by agreement, delegated not to the Board but to the BPPVE.

On August 18 of this year, the *Sacramento Bee* published an article by Michael Louie, Laila Weir and Lisa P. White titled "State oversight lax for vocational schools." The story detailed alarming allegations about the BPPVE's core competence, and warrants an extensive excerpt:

“The state's Bureau for Private Postsecondary and Vocational Education is responsible for protecting 400,000 students enrolled in an estimated 2,500 vocational and career training schools. With the stagnant California economy and state cuts in higher education, even more students may turn to these private postsecondary schools for career training.

The schools provide training in everything from truck driving to cosmetology. In recent years, offerings have followed the job market, with the fastest growth in health care and computers.

The bureau's original mandate expires in January, but a bill to continue the bureau to 2007 is before the state Senate.

An examination of bureau operations reveals a passive consumer-protection agency that does little to monitor schools:

*The bureau is slow to process new school applications, allowing some to operate for years without permanent licenses.

*The bureau spends little time evaluating the quality of the education schools offer.

*When the bureau looks into complaints, it rarely conducts field investigation or follow-up.

*The bureau doesn't monitor whether schools meet minimum graduation and job-placement rates required by law.

Bureau spokeswoman Pamela Mares, in an e-mailed statement, wrote, ‘The Bureau is in a continual process of evolving and improving its functions.’

According to bureau chief Michael Abbott, in an interview before he left the post earlier this summer, the bureaus work to improve its oversight has been hampered by staff shortages and budget cuts. Still, he acknowledged that the bureau usually is passive and has other serious weaknesses. ‘I'd rather be more proactive,’ he said.

The bureau is a relatively small and obscure part of the Department of Consumer Affairs, with an annual budget of $7 million and 60 authorized staff positions - about half its original size, according to Mares.

Student advocates and industry representatives, long at odds over the amount of regulation the schools need, agree on one thing: The bureau is largely ineffective.

> 'Students complain, and they do nothing about it,' said Elena Ackel, senior attorney at the Legal Aid Foundation of Los Angeles. 'It's totally worthless.'
>
> A computer analysis of the 1,177 complaints to the bureau during the past two fiscal years shows computer schools generated the most complaints, followed by cosmetology and health care schools. Of the complaints, 521 alleged deficiencies in educational quality, 293 claimed false advertising and other types of fraud, and 289 alleged failure to make proper refunds
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> A state audit in 2000 concluded that staff routinely marked complaint files closed after simply notifying schools about the allegations.
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> The auditors also found that the bureau let schools seeking licenses operate for more than a year while their applications were reviewed, 'exposing students to the risk' of substandard education and financial losses. Yet that practice has continued."

In light of this, it is vital that the Board engage in the highest level of monitoring of the BPPVE's areas of jurisdiction over court reporter schools, and be exceptionally vigilant of problems that may be arising because of BPPVE.

ISSUE # 7: The Board has not adopted a code of ethics for court reporters, even though the number of complaints alleging "unprofessional conduct" dwarfs all other kinds of complaints, combined.

Issue #7 question for the Board: *Given that unprofessional conduct is potentially so subjective, and given that fairness and due process require that licensees be fairly afforded prior notice of what conduct could cause them to lose their license, why has the Board not adopted a Code of Ethics? Can the Board commit to adopting such a Code by a date certain?*

Background: By far the largest category of complaints received by the Board are categorized – and presumably investigated and litigated – as "unprofessional conduct" cases. For example, of the 247 complaints received by the Board in 2003/04, 206 were categorized as involving unprofessional conduct. (*Report* at page 22)

However, what does and does not constitute "unprofessional conduct" is nebulous, and the Board does not further define it. B&P Section 8025(d) provides:

> "(d) Fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence in practice, or unprofessional conduct in the practice of shorthand reporting.

> 'Unprofessional conduct' includes, but is not limited to, acts contrary to professional standards concerning confidentiality; impartiality; filing and retention of notes; notifications, availability, delivery, execution and certification of transcripts; and any provision of law substantially related to the duties of a certified shorthand reporter."

"Acts contrary to professional standards" is not further defined. Typically, the Board will rely upon expert witnesses in disciplinary proceedings as to what constitutes "unprofessional conduct." (See, e.g., *Hall v. Court Reporters Board* (2002) 98 Cal.App.4th 633)(*Hall*) However, by definition, such expert testimony is after-the-fact and case-specific and cannot generically and before-the-fact apprise a licensee of what may or may not constitute "unprofessional conduct." This means that, to some measure, a licensee is not as fairly apprised as he or she might be as to the kind of conduct that might cause their license to be revoked or impaired.

Because of this lack of clarity, the Board must make educated – and potentially expensive – guesses in each instance as to whether an ALJ or a reviewing court will agree with the Board's interpretation, as was the case in *Hall*.

In *Hall*, the appellate court overruled the Board's interpretation of section 8025(d)'s definition of "unprofessional conduct" as embracing a reporter's failure to pay his subcontracting reporters. While a Code of Ethics may not impel a different result in that case (given that the Court held the scope of practice statute did not reach a licensee's fee paying conduct), the case illustrates the core problem: licensees should be as on notice as possible as to what constitutes unprofessional conduct, and the Board, armed with an established and specific Code of Ethics guiding its discretion, will be in a better posture to asses and defend the exercise of its disciplinary discretion.

In sum, adoption of a Code of Ethics would provide fairer notice to licensees and likewise provide greater consistency to the Board's discipline so that which cases are pursued and what remedies are suggested by an ALJ will be based on more clearly established criteria.

ISSUE #8: Current law does not permit the Board to disclose to the public when a licensee has been formally reprimanded.

Issue #8 question for the Board: *Should the statute be changed to permit the Board to disclose letters of reprimand to inquiring members of the public, just as other boards do? How frequently does the Board issue such letters? Are they of infinite or limited duration?*

Background: Current law may not permit the Board to disclose to the public when a licensee has been formally reprimanded. B&P Code sec. 8010 provides:

> "Information regarding a complaint against a specific licensee may not be disclosed to the public until an accusation has been filed by the board and the licensee has been notified of the filing of the accusation against his or her license and the disciplinary proceedings to be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. This section does not apply to citations, fines, or orders of abatement, which shall be disclosed to the public upon notice to the licensee."

The question is whether a formal letter of reprimand by the Board to a licensee is "information regarding a complaint." This phrase appears to apply to letters *from* complainants, as well as related information, investigatory materials, etc.

In contrast, a letter of reprimand is a *result* of such "information regarding a complaint," and may not technically fall within these parameters. Such a letter is based upon the information set out in this section, but is not, itself, that kind of information. In that sense, letters of reprimand are much more like "citations, fines or orders of abatement," which the statute says are subject to public disclosure upon notice to the licensee.

Failure to disclose such letters, like failure to disclose citations, fines or orders of abatement, would plainly be contrary to the fact that all are government acts which may – and should -- not be withheld from the public. In addition, the Board notes that such secrecy is contrary to DCA's own disclosure policy. (*Board's Response to Follow-up Questions*, p. 5)

Most pointedly, such secrecy is tantamount to the government knowingly providing false information to inquiring members of the public. A member of the public who inquired and was told a licensee had never been subject to discipline would be falsely led to believe that a licensee had a clean record in the opinion of the Board, despite the fact that the Board would have acted formally against the licensee to file the letter of reprimand.

Are the Board's formal letters of reprimand truly "information regarding a complaint," falling within the prohibition of section 8010? If the answer to this question is yes, this may require a clarifying change in the statute. If the answer is no, that letters of reprimand are not "information," regulations would be needed by the board to clarify the process for disclosing such letters of reprimand.

ISSUE #9: Whether the Board should seek statutory clarification that "unprofessional conduct" can include fraudulent conduct in any related context.

Issue # 9 question for the Board: *Given the holding in the* Hall *case – that even fraudulent conduct by a reporter is not necessarily grounds for discipline unless it narrowly involves the licensee engaging in fraud while preparing a transcript -- why hasn't the Board sought statutory clarification that fraud may be a grounds for discipline, given the sensitive and necessary trust reposed in reporters?*

Background: In *Hall*, a licensed court reporter stipulated to the fact that he had subcontracted with other court reporters to perform services, but never paid them the money he promised, even though he conceded that he himself had received payment. The Board brought an unprofessional conduct disciplinary action against *Hall*, and ordered his license revoked, ordered the revocation stayed pending his successful probation, and ordered restitution to the unpaid reporters. (See *Hall*, 98 Cal.App.4th at p. 635)

Hall appealed. The superior court upheld the administrative order, finding that Hall's conduct was "tantamount to fraud," but the Court of Appeal reversed. It found no statutory authority for the Board to take disciplinary action against a licensee on the basis of conduct that was "tantamount to fraud" (the accusation did not actually allege fraud) that was not connected with the licensee himself personally providing reporting services. (*Id.)*

The Court relied upon the plain language of B&P Section 8025(d), which provides:

> "(d) Fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence in practice, or unprofessional conduct in the practice of shorthand reporting."

It held that such fraud did not occur "in the practice of shorthand reporting." (*Id.* at p. 640) It thus overruled both the superior court and the Board.

This ruling obviously limits the ability of the Board to pursue actions against licensees engaged in some plainly harmful conduct; one that brings general disrepute to the profession. The legislative limitation the court focused on centers on the fact that the statute prohibits fraud "in" the practice of shorthand reporting, rather than, for example, fraud "related to" the practice of shorthand reporting. Such a concern could be addressed by the Legislature and the Governor.